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6 IN THE UNITED STATES DISTRICT COURT
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8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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10 FEDERAL TRADE COMMISSION,

No. C 10-00022 WHA

11 Plaintiff,

12 v.

**ORDER DENYING MOTION
TO STAY AND AMENDING
PRELIMINARY INJUNCTION**

13 INC21.COM CORPORATION, *et al.*,

14 Defendants.
15 _____/

16 In this enforcement action brought by the Federal Trade Commission, defendants move
17 for a stay — pending an appeal to the Ninth Circuit of the February 2010 order granting the
18 FTC’s motion for a preliminary injunction— of both discovery and the preliminary injunction
19 (Dkt. Nos. 57, 58, 60). For the reasons explained below, the motion is **DENIED**. Upon further
20 consideration of the arguments and authorities cited by the parties, however, the preliminary
21 injunction will be amended as detailed below.

22 In determining whether to grant a motion to stay a preliminary injunction pending an
23 appeal to the Ninth Circuit, a court must consider four factors: (1) whether the stay applicant has
24 made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be
25 irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the
26 other parties interested in the proceeding; and (4) where the public interest lies. *Golden Gate*
27 *Restaurant Ass’n v. City & County of S.F.*, 512 F.3d 1112, 1115 (9th Cir. 2008) (citation and
28 quotation marks omitted).

1 None of these factors supports the issuance of a stay of the preliminary injunction order.
2 As already explained in great detail in the February 2010 memorandum and opinion granting the
3 preliminary injunction, the FTC is likely to establish that defendants have engaged in illegal
4 practices (Dkt. No. 57). Because defendants have no right to continue those practices, they
5 cannot claim injury from being forced to desist. Moreover, the interest in protecting customers
6 from fraudulent billing practices is undeniably great. As such, for all of the reasons set forth in
7 the memorandum and opinion granting the preliminary injunction, defendants' motion fails.
8 Nothing argued by defendants with respect to these four factors warrants reconsideration of the
9 prior order's findings, or the stay that has been requested.

10 As a separate matter, however, defendants contend that the scope of the preliminary
11 injunction was overbroad in that it should not have ordered defendants to issue refunds to the
12 5,445 customers who failed the third-party verification ("TPV") examination.* On this specific
13 issue, defendants argue that such refunds would have the effect of improperly disgorging
14 defendants and ordering consumer redress prior to a trial on the merits and final judgment (Br. 8,
15 11; Reply 4). It is apparent from the briefing that this is defendants' primary concern with respect
16 to the breadth of the injunctive relief ordered by the Court.

17 Although neither side has provided legal authority that is directly on point, it appears that
18 an injunction that goes beyond restraining a party from committing illegal acts and orders
19 restitution to customers may exceed the scope of a prohibitory preliminary injunction. *See*
20 *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2008).
21 As such, in an abundance of caution, this order hereby amends the preliminary injunction and
22 strikes the provision requiring refunds to those customers that failed defendants' self-performed
23 TPV examination (Dkt. No. 58 ¶ 7). Instead, the preliminary injunction will be amended to freeze
24 defendants' assets so that refunds to these customers can be issued if the FTC prevails in this
25 action. *See Fed. Trade Comm'n v. Singer*, 668 F.2d 1107, 1111 (9th Cir. 1982) (recognizing a
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28 * Defendants have since revised this number downward to 4,616, due to an alleged miscalculation in their original declaration (Br. 4).

1 court's authority to freeze assets as part of a preliminary injunction order). The specific
2 amendment is set forth at the end of this order.


3 Finally, defendants fail to offer any compelling justification for staying discovery pending
4 their appeal (Br. 14). Indeed, the demand for an early trial, which necessitated an expedited and
5 abbreviated discovery period, came directly from the mouths of defense counsel. As such,
6 defendants' motion to stay discovery is also denied..

7 In sum, defendants' motion to stay both the preliminary injunction and discovery pending
8 their appeal to the Ninth Circuit is **DENIED**. Upon consideration of arguments made by both
9 sides, however, Paragraph 7 of the Preliminary Injunction is hereby **AMENDED** as follows:

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11 7. Defendants shall not transfer or otherwise dispose of any financial assets
12 (except to pay for ordinary business expenses as authorized by the
13 preliminary injunction) unless allowed by further order of the Court.
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15 **IT IS SO ORDERED.**

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17 Dated: April 13, 2010.



18 WILLIAM ALSUP
19 UNITED STATES DISTRICT JUDGE
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